No 87-2128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LEONARD CHAIRES,
PETITIONER,

VERSUS

UNITED STATES DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT, ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Merit System Protection Board and all lower courts have misconstrued the issue on appeal.

II. Whether a Plaintiff who alleges unlawful discrimination in employment by a federal agency may inadvertently relinquish his right to present his discrimination claims.

III. Whether a complaint filed as a mixed case complaint remains a mixed case complaint for purposes of appeal and trial de novo.

IV. What limitations are imposed upon the power of a federal agency to discharge an employee?

   A. Must a federal agency's disciplinary actions be properly selected for reasons relevant to the efficiency of the service.

V. Whether the decision below is in conflict with the principles set forth in this Court's decision in Chandler v. Roudenbush.

ALL PARTIES TO THE PROCEEDING

Petitioner: Leonard Chaires

Respondents: United States Department of Housing and Urban Development, (HUD), and
Secretary of HUD, Samuel R. Pierce.

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Petitioner, Leonard Chaires, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this case on December 9, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals is not officially reported. This opinion is

reproduced in the Appendix at A.1 - A.13.

The opinion of the District Court is not officially reported. It is reproduced at A.15 - A.18.

Also reproduced in the Appendix are the findings and decision of the Merit System Protection Board (A.23), the final order of the Merit System Protection Board (A.34),and the concurrence of the Equal Employment Opportunity Commission (A.36).

JURISDICTION

The judgment of the Court of Appeals was entered on December 9, 1987. A rehearing was requested and denied on February 1, 1988.

On April 29, 1988, Justice White signed an order extending the time to file a petition for writ of certiorari to and including June 1, 1988.

Jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutinal provisions involved are the First and the Fifth Amendment.

Federal statutes involved are: the Civil Rights Act of 1964 (42 U.S.C. §§2000e-5, 2000e-16); the Civil Service Reform Act of 1978 (5 U.S.C. §§2301, 2302, et seq.); 5 U.S.C. §7513(a); 5 U.S.C. §§7701, et seq.; and 29 C.F.R. §§1613.214(a), 1613.402(a), 1613.213, et seq.

STATEMENT OF THE CASE

FACT STATEMENT

Petitioner, Leonard Chaires, is Hispanic and a former career federal employee with more than 25 years of federal service. Petitioner began his career with the Department of Housing and Urban Development, HUD, in July 1969. He held the position of Regional Director of the Office of Fair Housing and Equal Opportunity, FHEO, from December 1974 until his removal in August 1983 for his alleged failure to accept a "directed" reassignment.

The difficulties between the Petitioner and HUD began in February 1982 when Mr. Dick Eudaly was appointed as Regional Administrator (RA) of HUD, Region VI, and thereby became Petitioner's immediate supervisor. Immediately thereafter, Petitioner became the object of repeated verbal abuse and job harrassment. In March 1982, one month after appointment, the RA told Petitioner that he was fluent in English and in Spanish, and that he could fire Petitioner in two languages. Thereafter, the RA approached a former HUD employee and informed him that he intended to remove Petitioner from his position as Regional Director, FHEO. Following these incidents, in April 1982 Petioner's Fort Worth Règinal Office was subjected to a Headquarter evaluation a little more than one month after Petitioner had received the operating plan for fiscal year (FY) 1982 (Petitioner received this operating plan 7

months after the beginning of FY 1982). During this Headquarter evaluation Petitioner was conveniently sent to Austin by the RA to testify at a Civil Rights Commission hearing.

On November 1, 1982, Petitioner was issued an unsatisfactory rating for FY 1982. Prior to this time,the critical elements on which Petitioner's performance was rated for FY 1982 were never discussed with him by his reviewing or rating officials, and the RA never communicated any reservations or concerns to Petitioner about his job performance. The performance evaluation addressed items not included in Petitioner's critical elements. Petitioner filed an informal grievance on November 15, 1982 with Mr. Eudaly, the RA, by memorandum. HUD's response to the informal grievance was untimely. Subsequently, a timely formal grievance on the unsatisfactory rating was filed with the Deputy Under Secretary for Field

Coordination (DUSFFC), Daniel Hughes. This formal grievance was never investigated.

Petitioner thereafter initiated two EO 11478 discrimination complaints on the basis of national origin, Hispanic, on November 19, 1982, and filed two separate complaints on December 28, 1982. The two complaints were joined by HUD for processing as FW 06-05. Petitioner alleged that the unsatisfactory rating was the product of discrimination, and procedural errors in violation of the Civil Service Reform Act. The investigation of this complaint was completed on January 7, 1984.

Petitioner continued to be harrassed. Petitioner's travel funds, the funds allocated to carry out Regional Program responsibilities, were so significantly cut for FY 1983 that they would have endangered Region VI's ability to meet the congressional intent of the Fair Housing Law. Petitioner filed a complaint on January 18, 1983 based

on the reduction in travel funds to the Regional Office of FHEO. Thereafter, the Regional FHEO Office travel funds were restored and Petitioner withdrew his complaint. Petitioner believed the reduction in travel funds was a reprisal for the discrimination complaint which had previously been filed for the unsatisfactory rating.

Office Incident. On May 19, 1983 Mr. Eudaly visited Petitioner in his office and used abusive and insulting language toward the Petitioner. Subsequently, the RA made the remark in front of a colleague that he knew how to "take care" of Petitioner. This strained working relationship provoked by Petitioner's immediate supervisor later provided the basis for Petitioner's reassignment to Chicago for the "good of the service." By creating a strained working relationship, the RA provided the necessary "management reason" for Petioner's reas-

signment. Petitioner initiated an EO 11478 complaint, FW 08-04, against Mr. Eudaly on May 20, 1983 and filed a complaint on June 22, 1983. After this incident, Petitioner was subjected to a HUD Region VI Management investigation and a Region VI Office of Investigation investigation which were both initiated by Mr. Eudaly.

Reprimands. Within a week of the office incident, Mr. Eudaly issued two reprimands against Petitioner. Petitioner considered the two reprimands given to him within a two day period as harrassment,intimidation, and possible tampering or interference in the investigation of an ongoing Title VIII complaint. As the result of these two reprimands, Petitioner initiated an EO 11478 discrimination complaint against Mr. Sevier and Mr. Eudaly on June 3, 1983 and filed a complaint on July 7, 1983. Appellant also filed a formal grievance against both Mr. Eudaly and Mr. Sevier with Mr. Gordon Walker,

DUSFFC, on June 1, 1983. The reprimands were removed without explanation by Mr. Eudaly on July 12, 1983.

Reassignment. On June 3, 1983 Petitioner received a letter dated June 1, 1983 from Judith Tardy, Assistant Secretary of Administration for HUD, informing him of the "decision" to reassign him from his position of Supervisory Equal Opportunity Specialist in the Fort Worth Reginal Office to the position of Equal Opportunity Officer in the Chicago Regional Office. In a letter dated July 18, 1983, Tardy informed Petitioner that it was her decision to reassign Petitioner to Chicago. Ms. Tardy signed the "decision" letter to reassign Petitioner, yet as Assistant Secretary of Administration for HUD, she lacked the authority to make the decision to reassign Petitioner. Petitioner never received a "directed" reassignment. Nevertheless, Petitioner was removed from federal employment for his failure to accept a

"directed" reassignment.

Petitioner was not made aware of the consequences of failing to accept the reassignment until one day after the effective reporting date. On July 11, 1983, Petitioner received notice that failure to accept the reassignment would leave Tardy no alternative but to propcse to involuntarily separate Petitioner; the effective reporting date of the reassignment was on July 10, 1983. This delay in notice of the consequences of the failure to accept the reassignment prevented the Petitioner from making an informed decision when he chose to decline the reassignment.

Prior to receiving the letter of June 1, 1983, Petitioner was never formally or informally informed by HUD concerning a possible transfer. At the time of the reassignment, Petitioner had (1) filed a grievance that had not yet been investigated, (2) initiated four discrimination complaints,

one complaint had been withdrawn, and three complaints had not yet been investigated, (3) ongoing Management and Office of Investigation investigations against him which were initiated by Mr. Eudaly, (4) an unsatisfactory rating for FY 1982, (5) two reprimands in his file, and (6) had yet to have his critical elements for FY 1983 communicated to him.

On June 6, 1983, Mr. Eudaly assigned Petitioner to unclassified duties. Petitioner's detail was such that his overall duties and responsibilities were inconsistent with his professional training, qualifications, and supervisory authority. Petitioner's authority was completely removed (This occurred before the effective reassignment date and before Petitioner had accepted or declined the reassignment). Petitioner was kept isolated and not informed about anything. Petitioner was not even invited to attend general staff meetings that

were held. This unclassified detail exceeded 90 days.

On June 8, 1983 Petitioner initiated a violation of the Hatch Act complaint against Mr. Eudaly; a formal complaint was filed with the Office of Special Counsel on July 6, 1983. Petitioner, thereby became a whistle-blower. Mr. Eudaly did in fact violate the Hatch Act, yet Mr. Walker took no action as required against Mr.Eudaly. Mr. Walker, DUSFFC, had constructive knowledge that Petitioner was a whistle-blower.

On August 29, 1983, Petitioner was present in Federal District Court in Chicago, Illinois for the case of Watson v. HUD. During this case, Mr. Gordon Walker testified under oath that Mr. Chaires, Petitioner, was reassigned to Chicago because he was Hispanic.

Removal. By letter from Secretary Pierce dated September 6, 1983, Petitioner received notice of the decision to remove him of his

position effective September 9, 1983. Petitioner received only the letter and no attachments or verbal information informing him that he could appeal the decision through HUD; the letter only provided that he could appeal his decision through the MSPB. Both Mr. Walker and Secretary Pierce were aware of the Petitioner's intolerable working conditions yet did nothing to resolve them. Petitioner initiated an EO 11478 complaint against Secretary Pierce on September 19, 1983, and filed a complaint on October 27, 1983. Petitioner's complaint included allegations that he was constructively removed from his position effective September 9, 1983. Petitioner then appealed to the MSPB on September 26, 1983.

COURSE OF PROCEEDINGS AND DISPOSITION IN LOWER COURTS

Leonard Chaires filed a Pro Se complaint against HUD and five employees and former employees of HUD in their official and individual capacities in the U.S. District

Court for the Northern District of Texas, Dallas Division on March 20, 1986. These personnel actions consisted of an unsatisfactory rating (Complaint FW 06-05), the office incident of harrassment (Complaint FW 08-04), the two written reprimands (Complaint FW 08-05), Petitioner's reassignment (Complaint FW 12-02), and Petitioner's removal (Complaint FW 11-02M). Petitioner alleged that these personnel actions were taken in violation of his rights under the First and Fifth Amendments, the Civil Rights Act of 1964, the Civil Service Reform Act of 1978, and the Administrative Procedure Act.

Petitioner's mixed case removal complaint was appealed through the MSPB and on January 20, 1984 the Presiding Official concluded that the exercise of the agency's discretion in the reassignment could not be deemed arbitrary, capricious, or unreasonable. On July 9, 1984 the MSPB in Washington affirmed the Presiding Official's decision. On Febru-

ary 26, 1986, the Office of Review and Appeals of the EEOC concurred in this decision.

By order dated July 23, 1986, the district court dismissed all claims against the federal officials in their individual capacities and found that the exclusive remedy for discrimination claims in federal employment to be Title VII. The Court mistakenly states that Petitioner raised "four" personnel actions before the court. The Court fails to acknowledge the office incident complaint and the reassignment complaint.

On December 17, 1986 Petitioner made a motion to amend his pleadings. At the time Plaintiff raised the first three complaints (FW 06-05, 08-04, and 08-05) before the district court, it had no jurisdiction to review the Final Agency Decision on December 3, 1985. Since Petitioner appealed this decision to the EEOC Office of Review and Appeals on December 13, 1985, his claims on these matters could not be brought in District

Court for 180 days. 42 U.S.C. §2000e-16. Petitioner waited only 97 days, and as such, these claims were premature. Petitioner was seeking to amend his pleadings to include these three complaints. Petitioner also sought to amend his claims for damages. It appears that when the district court dismissed the claims against the individual federal officials, his claims for reinstatement and back pay and other remedies were eliminated. Before the District Court ruled on this motion, it rendered its final judgment.

On December 19, 1986, the District Court held that it lacked subject matter jurisdiction over the MSPB appeal on the basis that Petitioner's claim was not a "mixed" claim. The Court then granted Defendant's motion for Judgment on the Pleadings, or in the alternative, for Summary Judgment. Petitioner's motion to reconsider was denied on March 26, 1987, and on April 8, 1987 a timely notice of appeal was filed with the

Fifth Circuit.

On December 9, 1987, the Fifth Circuit found that the Court of Appeals for the Federal Circuit had "exclusive jurisdiction when all claims of discrimination have been eliminated from the case," and that absent a claim of discrimination no genuine fact issue existed. The Court thereby affirmed the judgment on the pleadings under Fed. R. Civ. P. 12(c). Thereafter on February 1, 1988, the court denied Petitioner's motion for rehearing or modification of its decision. Mr. Chaires presents this decision for review.

REASONS FOR GRANTING THE WRIT

The most important reason for granting this writ is to enforce the policy of the United States government to provide equal opportunity in employment for all persons, to prohibit discrimination in employment based on national origin, and to promote the full realization of equal and fair employment rights in governmental agencies.

This case affords the Supreme Court the important opportunity to define the limitations imposed upon a federal agency's power to discharge an employee. Section 5 U.S.C. §7513(a) clearly limits the power of a federal agency to discharge an employee to such cause as will "promote the efficiency of the service." In interpreting this provision, the lower circuits are in disagreement. Some Circuits merely require that the agency establish some "rational basis" for its decision, while others require that the agency establish a "vital nexus" between the disciplinary action imposed and the "efficiency of the service." The Petitioner suggests that the purpose of the Civil Service Reform Act of 1978, to prevent abuse of agency power and to safeguard federal employees against arbitrary actions, can better be served by requiring that a disciplinary sanction imposed by a federal agency be properly selected for reasons relevant to the promotion

of the efficiency of the service. This requirement would safeguard an employee against harsh and unmerited disciplinary actions.

This case also presents several other important questions of law. Because the lower courts have consistently misconstrued the issue before the Merit System Protection Board, the Petitioner has been denied any due process on his Title VII reassignment complaint. This complaint was accepted under the EEOC process and never rejected or investigated. Petitioner sought appeal of this issue to the district court so that he might be afforded some hearing on the matter. The District Court, along with the Fifth Circuit has failed to acknowledge or address this complaint in any manner. The Fifth Circuit erred in affirming the judgment on the pleadings because this claim is entitled to a trial de novo under the protections of Title VII, 42 U.S.C. §2000e-16.

This case also presents an important question as to whether a case filed as a mixed case complaint remains a mixed case complaint for purposes of appeal in district court when some of its claims of discrimination have been eliminated.

The Petitioner before this Court is a Pro Se Petitioner who has diligently and painstakingly sought to protect his rights and to protect the integrity of the standards set forth in the Civil Rights Act of 1964 and the Civil Service Reform Act of 1978. Petitioner's case is one example of the failure of the system to protect its governmental employees from abuse of agency power, and so Petitioner respectfully urges this Supreme Court to grant this writ of certiorari.

I. THE MERIT SYSTEM PROTECTION BOARD AND ALL LOWER COURTS HAVE MISCONSTRUED THE ISSUE BEFORE THE BOARD.

A. The complaint before the Board was the Petitioner's removal complaint.

The Merit System Protection Board (MSPB)

misconstrued the issue on appeal before the Board. The complaint before the MSPB was on the issue of Petitioner's removal, not on Petitioner's reassignment. In addition to raising allegations of Title VII discrimination, Petitioner's removal complaint alleged that he was constructively discharged from his position, and that his removal was in retaliation and reprisal for several formal grievances and EO 11478 Complaints filed against several HUD officials. A review of the MSPB's decision reveals that the presiding official erred in determining and deciding the issue before the Board (A.23). The Presiding Official mischaracterized the issue before the Board as " whether the agency has met its initial burden of showing legitimate reasons for the reassignment." (A.26). The legitimacy of the reassignment was the subject of complaint FW 12-02, a complaint properly initiated under the Equal Employment Opportunity Commission (EEOC) process.

Therefore, the MSPB was without jurisdiction to entertain the complaint. (A.55, ¶9). Rather the issue before the Board should have been limited to whether or not the Agency could establish by a preponderance of the evidence whether Petitioner's removal was for the "efficiency of the service."[1] See McClelland v. Andrus, 606 F.2d 1278 (D.C. Circuit 1979); Bonet v. United States Postal Service, 661 F.2d 1071 (5th Cir. 1981); Phillips v. Bergland, 586 F.2d 1007 (4th Cir. 1978).

HUD failed to meet its burden of proof as to the appropriate issue before the Board. No evidence was presented at the MSPB Hearing to suggest that Petitioner's removal would promote the efficiency of the service. Because HUD failed to meet its burden of proof as to Petitioner's removal, the lower

[1] The Presiding Official mischaracterized the standard of proof required to be met by HUD as a showing of "legitimate reasons" for the Agency's actions. Section 7513, 5 U.S.C., requires that the agency prove that its actions are such that will "promote the efficiency of the service."

courts have erred in affirming the MSPB decision.

B. The Merit System Protection Board refused to entertain Petitioner's constructive discharge claim.

The Petitioner properly raised allegations of constructive discharge in both his complaint before the MSPB, and in his complaint before the District Court. The Presiding Official, however, removed all substantive evidence as to this claim during the prehearing conference saying it was "irrelevant" to the issue before the Board. Once again, the Presiding Official failed to recognize the issues before the Board to Petitioner's detriment. Although Petitioner raised this claim before the District Court, the District Court also failed to address this issue.

C. The Merit System Protection Board did not have jurisdiction to entertain the Reassignment Complaint.

The sole issue on appeal before the MSPB was Petitioner's removal complaint. The MSPB

lacked jurisdiction to entertain the Petitioner's reassignment complaint because this complaint was properly initiated under the EEOC process. On July 29, 1983, the Petitioner properly filed a "mixed case" complaint concerning his reassignment pursuant to 29 C.F.R. §1613.402(a) and §1613.214(a)(3). (A.50). This reassignment complaint raised allegations of Title VII discrimination, in addition to raising allegations as to the propriety of the reassignment. The Petitioner also alleged that the reassignment was in retaliation for pending grievances and EO 11478 Complaints the Petitioner had filed against HUD officials. This complaint was acknowledged as received on August 23, 1983 and given the complaint number FW 12-02 (A.52). This complaint was never appealed through the MSPB process.

The decisions of the lower courts and the MSPB have consistently confused the removal complaint with the reassignment complaint.

The Petitioner submits that the reassignment, itself, was not at issue before the MSPB, and therefore, the lower courts have erred in affirming a decision based on the reassignment. Reversal by this Court is warranted as this error casts sufficient doubt as to the reliability of the agency's fact findings and decision. The Board's misconstruction of the issue before it is per se harmful error as it prejudiced the Petitioner's right to a fair hearing on the matter of his removal.

II. PETITIONER DID NOT ABANDON HIS CLAIMS OF DISCRIMINATION DURING THE MERIT SYSTEM PROTECTION BOARD HEARING, AND THEREFORE, THIS CASE SHOULD PROCEED AS A MIXED CASE COMPLAINT.

Petitioner's MSPB Hearing was held on December 7, 1983. Immediately preceding this hearing, an extensive, confusing pre-hearing conference was held on which no records were kept. It was during this prehearing conference that the Presiding Official ruled that he would not consider or entertain any

allegations of discrimination, grievances, or reprisals. After specifically asking the Presiding Official for clarification as to this determination, the Petitioner personally asked the Presiding Official if he would lose his rights to continue his discrimination complaint process with HUD if he chose to proceed without bringing up his discrimination complaints and other allegations. The Petitioner received the Presiding Official's personal assurances that he would not lose his discrimination rights with HUD. Petitioner then made the decision to continue with the hearing by placing the burden on HUD to establish by a preponderance of the evidence the Agency's reasons for its actions. At no time did the Petitioner ever make any "tactical" decision to withdraw his claims of prohibited personnel practices, rather it was the Presiding Official who misled the Petitioner into believing that he would not lose his rights to these allega-

tions if he chose to let the agency bear the burden of proof. In a subsequent hearing before the EEOC, the Petitioner reiterates this point:

Mr. Chaires - Can I ask a point of clarification?
Examiner Hammond - Yes
Mr. Chaires - When we presented our case to the MSPB, we were prepared on the grounds of presenting something on discrimination, at the initial hearing, when we discussed it at the very beginning, they said that nothing relating to the discrimination part could be presented, so consequently, we had to limit our presentation of a hundred percent down to ten percent...

At this EEOC Hearing Mr. Ronquillo, Petitioner's attorney at the MSPB hearing, also testified that the Petitioner was not allowed to raise his allegations of discrimination:

Examiner Hammond - Okay, and it also--you were not allowed to raise the allegation of discrimination?
Mr. Ronquillo - That's correct.
Mr. Peeler - I would object to that, they were allowed to raise it, they elected not to.
Mr. Chaires - That's not correct.

Mr. Ronquillo-I was at the prehearing conference, and the Hearing Official indicated that because of the dual structure in the Civil Service Reform Act, that the MSPB would not entertain allegations with respect to EEO considerations...

During the prehearing conference, Petitioner was led to believe that the hearing would not proceed unless he withdrew his allegations of discrimination. As a result of the pre-hearing conference,which was not on the record, the Petitioner was not allowed to present approximately 90% of his case. This portion of the case was the substance of the petitioner's complaint, and he would have never withdrawn these allegations on his own initiative. In fact, the Petitioner had prepared and made available for the hearing three volumes of material pertaining to his allegations of discrimination.

The controversy over whether this complaint remained a "mixed case" complaint for purposes of an appeal stems from language used by the Presiding Official during the MSPB

Hearing:

> As one of the elements of its case in chief [Petitioner] has indicated he chose not to bear the burden on these matters that he raised in response thereto by way of affirmative defense, but only by way of bringing into the issue the legitimacy of those agency reasons.
>
> The Presiding Official has accepted this as a stipulation from [petitioner] and had indicated that he will be addressing them in this context only and that he would note to that effect during the prehearing conference, during his opening statement so that all parties thereto could express agreement.

This language is confusing and unclear, yet no objections were forthcoming from the Petitioner because he was relying on the underlying discussion and the assurances he received from the Presiding Official during the prehearing conference. The true meaning of these words needs to reflect the truth of what what was discussed and agreed to at the prehearing conference. Nevertheless, the language itself does not indicate that the Petitioner abandoned his discrimination claims.

As the Presiding Official himself stated,

"the Agency ultimately always bears the burden of persuasion to establish by a preponderance of the evidence" its reasons for its actions. Furthermore, assuming in arguendo, that the Petitioner actually chose not to bear the burden on these matters by way of affirmative defense, the Presiding Official clearly stated that the Petitioner could raise his allegations of discrimination "by way of bringing into the issue the legitimacy of those Agency reasons." Thus, the discrimination elements were clearly not eliminated from the claim. The Fifth Circuit has held in the case of Wiggins v. United States Postal service, 653 F.2d 219 (1981), that Section 7702, 5 U.S.C., is not limited to individual claims of discrimination, but is instead extended to any "cause of any employee... who alleges that a basis for the action was discrimination..." 5 U.S.C. §7702 (a)(1). The Senate Report on this section refers to the district courts' jurisdiction

over decisions of the Board "involving discrimination complaints." S. Rep. No. 95-969 at 63. Therefore, both the statute and its legislative history define jurisdiction in terms of "cases" which "involve discrimination," and not in terms of "discrimination claims." As the Wiggins Court found, "this suggests that the Congress intended district court jurisdiction to extend to all claims in any case involving a charge of discrimination. As such, Petitioner's removal complaint which was filed as a "mixed case" complaint, remained a "mixed" complaint for purposes of appeal to the district court. Therefore, both lower courts have erred in not recognizing this complaint as a "mixed" complaint pursuant to 29 C.F.R. §1613.402(a). Petitioner respectfully urges this court to "save [Petitioner's] proper remedies" as to his discrimination claims, and reverse the decisions of the lower courts so as to enable him to have his discrimination claims

addressed by the District Court.

III. WAS PETITIONER DISCHARGED FOR SUCH CAUSE AS WOULD PROMOTE THE EFFICIENCY OF THE SERVICE?

A. An employee may only be discharged for such cause as will "promote the efficiency of the service."

Although an Agency enjoys wide discretion in determining what reasons may justify removal of a federal employee, the power to discharge an employee is not unlimited. Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969). Through Section 7513(a), 5 U.S.C., Congress has expressly limited an agency the right to discharge or suspend a civil service employee except for such "cause as will promote the efficiency of the service." McClelland, supra; Bonet, supra; and Phillips, supra. Therefore, "simply having an identifiable cause [for discipline] is not sufficient to warrant adverse action" against a civil service employee. Young v. Hampton, 568 F.2d 1253, 1259 (7th Cir. 1977); Phillips supra. In every adverse action against a

government employee, the agency must determine (1) that the employee misconduct has, in fact, occurred, and (2) that the disciplinary action taken will promote the efficiency of the service." Phillips at 1010; Young at 1257.

The first judgment, that the individual to be disciplined actually committed the acts complained of, was never clearly established at the MSPB Hearing. Every lower decision has repeatedly assumed that the Petitioner received a "directed" reassignment, when in fact he did not. Ms. Judith Tardy, a crucial witness to the Petitioner's case, was excused from testifying at the MSPB Hearing after she submitted a stipulation claiming that she "directed" the reassignment, so the Petitioner was not allowed to question her. The evidence, however, supports the Petitioner's argument that he never received a "directed" reassignment, and that the "decision" letter he received was signed by the wrong official.

Petitioner's claims of a lack of proper procedural due process have been repeatedly ignored.

On June 3, 1983, the Petitioner received a letter dated June 1, 1983 from Ms. Tardy, the Assistant Secretary of Administration for HUD, informing him of her "decision" to reassign him from his position of Supervisory Equal Opportunity Specialist in the Fort Worth Regional Office to the position of Equal Opportunity Officer in the Chicago Regional Office (See A.57). In a letter dated July 18, 1983, Tardy informed the Petitioner that it was "her" decision to reassign him to Chicago, yet in fact, she was not the deciding official on the Petitioner's reassignment; Mr. Gordon Walker, Deputy Under Secretary for Field Coordination (DUSFFC), was the deciding official. (See A.59-A.64, and A.69, ¶6,7). Ms. Tardy signed the "decision" letter to reassign the Petitioner, yet as Asst. Sec. of Administration for HUD, she

lacked the authority to make the decision to reassign the Petitioner. In HUD, the authority to take an adverse action follows the organizational chain-of-command, not the program chain-of-command. Therefore, the DUSFFC has been delegated the authority, acting on behalf of the Secretary and the Under Secretary for HUD, to decide on adverse actions against employees; the Asst. Sec. of Administration for HUD is without authority to act in this manner. Thus, the Petitioner only received a "decision" letter informing him of the transfer signed by a HUD official who lacked the authority to sign as the decision-maker; the Petitioner never received a "directed" reassignment. It follows that failure to act on an improper reassignment cannot be viewed as an act of insubordination.

Other circumstances also serve to mitigate the Petitioner's failure to accept the reassignment. Although the Petitioner formally

declined the reassignment by a letter dated June 27, 1983, the Petitioner did not receive notice until July 11, 1983, one day after the effective reporting date of July 10, 1983 (emphasis), that failure to report would leave Tardy no alternative but to propose to involuntarily separate Petitioner. (Although this letter was dated July 8, 1983, this letter was hand-delivered to the Petitioner on July 11, 1983 at 1:30 p.m.)(A.61). This was the first notice the Petitioner received informing him that he could be terminated for failure to accept the reassignment. Furthermore, neither HUD nor the MSPB gave any solicitude to Petitioner's hardship situation concerning the transfer to Chicago (See A.70). Petitioner, a resident of Arlington, Texas for 12 years at the time, was clearly established in the community. He had two daughters attending college in Arlington, and one daughter attending the University of Texas in Austin. Furthermore, Mrs. Chaires,

Petitioner's wife, was sick at the time.

HUD also failed to establish that the disciplinary action taken against the employee was such that would "promote the efficiency of the service." The 1978 Civil Service Reform Act provides that the federal government employer may discharge its employees "only for such cause as will promote the efficiency of the service." 5 U.S.C. §7513(a). The 1978 Act further provides that, absent criminal conviction, an agency may only take disciplinary action against an employee on the basis of conduct that adversely affects the performance of the employee himself or of other employees. 5 U.S.C. §2302(b)(10); Bonet v. U.S. Postal Service, supra. Thus, the 1978 Act prohibits the discharge of a federal employee for conduct that does not adversely affect the performance of that employee or his co-employees. At the MSPB Hearing, HUD failed to present any evidence indicating that Petitioner's continued

employment in HUD would adversely affect his performance or the performance of his fellow employees. In fact, HUD failed to establish in any manner that Petitioner's discharge would promote the efficiency of the service. Prior to removal, the Petitioner had completed in excess of 25 years of unblemished federal service. Until the political appointment of Mr. Dick Eudaly in 1982, Petitioner had never encountered any difficulties in all his years of service to the government; he had an outstanding work record, and he had never filed any complaints or grievances against HUD. It is also worthy to note, that prior to his appointment as Regional Administrator of HUD in Region VI, Mr. Eudaly had no prior HUD experience.

B. <u>HUD failed to establish a vital nexus between the agency's action and the efficiency of the service.</u>

In every case of adverse action against a federal employee, the Agency must establish a "vital nexus" between the alleged

act of misconduct and the efficiency of the service. Phillips v. Bergland, 586 F.2d 1007 (4th Cir. 1979). In the absence of any attempt on the part of an agency to prove any actual nexus between the employees alleged misconduct and the efficiency of the service, a decision to discharge cannot be upheld. Bonet at 1079. Merely reciting the language of the statute that the discharge will "promote the efficiency of the service" does not satisfy the agency's requirement:

> Without ignoring the safeguards against arbitrary dismissal from public employment which are embodied in the statute and in those regulations, an employer agency cannot justify a discharge merely by reciting in conclusory fashion the language of the statute. Instead, the agency must demonstrate some "rational basis" for its conclusion that a discharge will promote the efficiency of the service.

White v. Bloomberg, 345 F. Supp. 133, 144 (D.Md. 1972), aff'd 501 F. 2d 1379 (1974); See also Phillips at 1011. HUD never presented any evidence in an effort to demonstrate some rational basis for its

conclusion that Petitioner's discharge would promote the efficiency of the service. In fact, during the MSPB Hearing, the actual deciding official on Petitioner's transfer could not even define what the "mission" of HUD was and how Petitioner's transfer would effectuate that mission:

Mr. Walker - I believe the recommendation [on Petitioner's transfer] was based on it was good for the management of the department.
Mr. Ronquillo - I'm sorry what was it again?
Mr. Walker - It was good for the management of the department--necessary to perform the mission.
Mr. Ronquillo - Did they ever define specifically the mission? Or was this just stock language?
Mr. Walker - I wouldn't be able to answer that, you would have to get that from Ms. Tardy.

The lower courts have erred in affirming the MSPB decision. The Board's decision was an abuse of discretion in that there was no evidence in the record,whatsoever,that the Petitioner's discharge would promote the efficiency of the service. In its decision, the MSPB clearly violates the requirements of 5 U.S.C. §7513(a) by setting the wrong

standard of proof. Because HUD clearly failed in all respects to prove a nexus between the Petitioner's removal and the "efficiency of the service," the decisions of the MSPB and the lower courts should be reversed.

C. THE DISCIPLINARY SANCTION IMPOSED IN THE PARTICULAR CASE MUST BE PROPERLY SELECTED FOR REASONS RELEVANT TO THE PROMOTION OF THE EFFICIENCY OF THE SERVICE.

A federal agency must not only prove by a preponderance of the evidence that the adverse action against a civil service employee was taken for such cause as will promote the efficiency of the civil service, but also that the disciplinary sanction imposed in the particular case at issue was properly selected for reasons relevant to the promoton of the efficiency of the service. Mitchum v. Tennessee Valley Authority, 756 F.2d 82 (U.S.Fed. Cir. 1985); 5 U.S.C. §§7513, 7701; Douglas v. Veterans Administration, 5 MSPB 313 (1981). Under Douglas and Mitchum, the Presiding Official,

in determining the appropriateness of the penalty imposed, is required to ascertain whether the federal agency has responsibly balanced relevant factors in the individual case and selected a penalty within the tolerable limits of reasonableness. The Petitioner respectfully urges this Court to adopt this test as a means of safeguarding federal employees from harsh and unmerited penalties imposed by federal agencies. Douglas suggests a list of factors which might be considered in determining the appropriateness of a penalty or disciplinary action. Among these factors are the nature and seriousness of the offense; the employee's job level and type of employment; the employee's past work record; the employee's past disciplinary record; the employee's past work record, including length of service, performance on the job; the effect of the offense upon the employee's ability to perform; mitigating circumstances sur-

rounding the offense; and the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others. Douglas at 332. Petitioner's removal is harsh, unmerited, and inconsistent with the standards provided for in Mitchum and Douglas.

Prior to Chaires' removal, he had enjoyed 25 years of dedicated federal service. He served in the Korean War and was entitled to the protections of the Veteran's Preference Act, 5 U.S.C. §§2108, 3501 et seq. During his years of federal service, the Petitioner has received many promotions for his outstanding federal service. The Petitioner was a GS-15 level employee, which is one of the highest federal career level positions; the next highest position is that of a political appointee. Prior to 1982, Petitioner had never filed a complaint or grievance against anyone; he had never been the recipient of any disciplinary action,

nor of any reprimands. There is no legitimate basis for the severity of the penalty imposed upon the Petitioner. Several less restrictive and more meaningful alternatives were available to HUD. For instance, the Petitioner could have been transferred to a different program area in the same region, or if the agency felt that discipline was necessary, it could have imposed a suspension. If the efficiency of the service was the true objective being sought, it is highly impractical and illogical to so quickly discharge a highly qualified and experienced veteran employee such as the Petitioner.

HUD failed in any way to establish that the Petitioner's discharge was for such cause as would promote the efficiency of the service. HUD further failed to establish any "vital nexus" between the agency's action and the "efficiency of the service." In addition, the penalty of a discharge, in

light of the circumstances and the Petitioner's past work record is harsh and was not reasonably selected for reasons relevant to the efficiency of the service. Petitioner's discharge was not predicated upon his work record or his ability to perform, but rather only upon the Petitioner's failure to accept a questionable and procedurally improper reassignment. No evidence, substantial or otherwise, exists in the administrative record to support the conclusion that Petitioner's removal was necessary to effectuate the efficiency of the service. The inequities in the disposition of this case are blatant. The lack of evidence supporting the MSPB's decision to uphold Petitioner's removal renders the decision arbitrary, capricious, and an abuse of discretion. Accordingly, the Petitioner respectfully urges this Court to reverse the decisions of the Fifth Circuit and the District Court.

IV. THE DECISION BELOW IS IN CONFLICT WITH THE PRINCIPLES ESTABLISHED IN CHANDLER V. ROUDENBUSH.

A. The Petitioner's claim was properly filed as a mixed case complaint.

The Petitioner properly filed a mixed case complaint pursuant to 29 C.F.R. §1613.402(a) and 29 C.F.R. §1613.214(a) on July 29, 1983. This reassignment complaint raised allegations of Title VII discrimination. It further questioned the propriety of the reassignment and the circumstances surrounding the reassignment.

This complaint was acknowledged as received on August 23, 1983, and given the complaint number FW 12-02 (See A.52). This complaint was never rejected, investigated, or closed. Under the provisions of 42 U.S.C. §2000e-5, and §2000e-16, and 5 U.S.C. §7702 (e)(1), because the Petitioner has never received a judicially reviewable action, the Petitioner is entitled to a trial de novo. The Fifth Circuit clearly erred in affirming the District Court's Judgment on

the Pleadings. The Petitioner's reassignment complaint is a cause of action within the Civil Service Reform Act of 1978 and the Civil Rights Act of 1964, and therefore, a judgment on the pleadings is inappropriate.

B. Title VII Discrimination Claims are entitled to trial de novo.

This Court clearly established in Chandler v. Roudenbush, 96 S.Ct 1949 (1976), that federal employees have the same right to a trial de novo as is enjoyed by state government employees under the amended Civil Rights Act of 1964. 42 U.S.C. §§701, et seq.; 42 U.S.C. §2000(e) et seq.. Section 717(c), 42 U.S.C. §2000e-16(c), provides that a federal employee may file a civil action against the head of a department or agency when action on the complaint has not been taken. The Petitioner has properly complied with all the processing requirements of his mixed case reassignment complaint, and is therefore entitled to a trial de novo in district court. The Fifth

Circuit Court of Appeals erred in upholding the decision of the district court and so this judgment should be reversed.

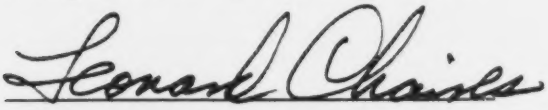
C. All lower courts have failed to recognize this claim.

All lower courts and decisions have confused the Petitoner's reassignment complaint with the Petitioner's removal complaint. These complaints are two entirely different complaints. The reassignment complaint was initiated under the EEOC process and was never appealed throught the Merit System Protection Board. As a mixed case complaint, the lower courts have erred in not affording the Petitioner a trial de novo on the matter. The lower courts have further erred by affirming a judgment on the pleadings. The Petitioner respectfully urges this Court to reverse the decisions of the lower courts because of error.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,



LEONARD CHAIRES
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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 87-1267

Summary Calendar

LEONARD CHAIRES, Plaintiff-Appellant,

V.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL., Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas (CA3-86-0702-F)

(December 9, 1987)

Before CLARK, Chief Judge, WILLIAMS and DAVIS,

PER CURIAM:

Appellant, Leonard Chaires, filed in federal district court a 50 page pro se complaint against HUD and five employees and former employees of HUD (in their official and individual capacities), complaining of four personnel actions, including his termination from employment. Appellant alleged that the personnel actions were taken in violation of his rights

under the First and Fifth Amendments, the Civil Rights Act of 1871 (42 USC §2000e-16), the Civil Rights Act of 1968 (42 USC §§3601 et seq.), the Civil Service Reform Act of 1978 (5 USC §§2301, 2302), and the Administrative Procedure Act (5 USC §§701 et seq.). The district court granted judgement on the pleadings for HUD and the officials.

I.

Appellant was a career federal employee and last held the position of Regional Director of the Office of Fair Housing and Equal Opportunity in Fort Worth, Texas. The first of the four negative personnel actions taken by HUD was an unsatisfactory performance rating of Chaires issued on November 1, 1982. Two more personnel actions, written reprimands, were delivered to appellant om May 26, 1983, and May 27, 1983, for his alleged overreaching of authority into the New Orleans area and for improper notice to HUD concerning an investigation by Appellant's staff. Appellant filed discrimination complaints against the

issuers of the reprimands. He considered the reprimands as "harrassment, intimidation, and possible tampering or interference in the investigation of an ongoing Title VIII complaints."

The EEOC held a hearing on March 22 and 23, 1985, regarding appellant's complaints filed against the first three personnel actions (the performance rating and reprimands). The attorney-examiner for the EEOC recommended a decision of "no discrimination" which was adopted as the final agency decision on Dec. 3, 1985. Appellant appealed this decision to the EEOC appeals office on Dec. 13, 1985.

The fourth and last personnel action was the involuntary separation of appellant from federal employment, effective Sept. 9, 1983, for his refusal to accept a directed reassignment from Fort Worth to Chicago. Appellant appealed the termination decision to the Merit System Protection Board (MSPB). He claimed that his reassignment and later termination had procedural defects, were in retaliation for a large number of grievances and discrim-

ination complaints filed by him against his supervisors, and constituted discrimination against him because of his age, sex, and Hispanic origin.

Collaterally with the MSPB appeal, appellant filed a discrimination complaint against the Secretary of HUD based upon the EEOC regulations. This complaint was rejected because of appellant's prior appeal to the MSPB on identical grounds. Appellant asserts that he was never informed of his rights or options to pursue the HUD complaint instead of relying on the MSPB appeal.

Appellant contends that the MSPB presiding official did not allow him or his counsel to raise discrimination complaints, grievances, and criticism of HUD management, on the grounds that such matters were irrelevant to the issue before the MSPB. The government states, however, that appellant, on advice of counsel, elected for tactical reasons to withdraw his discrimination claims so that he would not have to bear the burden of proof on

these issues.

The decision of the MSPB dated Jan. 20, 1984, stated that the appellant stipulated that he was not raising prohibited personnel practices as an affirmative defense, but instead chose to proceed on the basis that the agency could not establish by a preponderance of evidence that there were legitimate management reasons for the reassignment to Chicago. The Presiding Official concluded that the exercise of the agency's discretion in the reassignment of appellant was appropriate and could not be deemed arbitrary, capricious, or unreasonable. On July 9, 1984, the MSPB in Washington affirmed the presiding official's decision.

By order dated July 23, 1986, the district court dismissed all claims against the federal officials in their individual capacities; found the Civil Rights Act of 1968, 42 USC §3601 et seq. (also known as the Fair Housing Act), to have "no application" in this case; found that the exclusive remedy for claims of discrimination in federal employment was Title VII.

Appellant does not raise an issue on appeal concerning the APA. We confirm his decision not to do so by pointing out that there is no review of a personnel decision involving a federal employee under the APA. Towers v. Horner, 791 F.2d 1244, 1247 (5th Cir. 1986); Broadway v. Block, 694 F.2d 979, 986 (5th Cir. 1982).

In a second critical order, dated Dec. 19, 1986, the district court held that it lacked subject matter jurisdiction over the MSPB appeal since appellant's claim was not a "mixed" claim, and only mixed claims are reviewable in the district courts. A "mixed" claim must contain both discrimination and non-discrimination claims. See 5 USC §7703(b)(1) and (2). The court, therefore, granted appellees' motion for judgment on the pleadings. Fed. R. Civ. P. 12(c). Appellant's motion to reconsider was denied on March 26, 1987. A timely notice of appeal was filed on April 8, 1987.

II.

A Rule 12(c) motion for judgment on the pleadings, like a motion for summary judgment, is to be granted only if there is no issue of material fact and if the pleadings show that the moving party is entitled to prevail as a matter of law. Greenberg v. General Mills Fun Group, Inc., 478 F.2d 254, 256 (5th Cir. 1973); See United States v. An Article of Drug, 725 F.2d 976, 984 (5th Cir. 1984). All reasonable factual inferences must be drawn in favor of the "party opposing the motion." Reid v. State Farm Mutual Automobile Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986). The same standards apply on appeal. Id.

Issue 1: The first issue is whether the court erred in dismissing appellant's appeal of the MSPB decision for lack of subject matter jurisdiction after appellant failed to preserve a claim of discrimination before the MSPB.

The claims of the aggrieved federal employee, based on either discrimination grounds, may be raised before the MSPB. The statute, 5 U.S.C. §7701(a), provides in part,

"An employee, ... may submit an appeal to the [MSPB] from any action which is appealable to the Board under any law, rule or regulation."

While appellant asserts otherwise, the record is clear that he abandoned the discrimination issues he had originally raised before the MSPB.[2]

The district court, therefore, dismissed appellant's case upon 5 U.S.C. §7703(b)(1)(2) because jurisdiction over an appeal in a MSPB non-discrimination case lies only with the U.S. Court of Appeals for the Federal Circuit and not in any district court. Section 7703 (b)(1) provides in part that: "Except as

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[2] The district court did not address appellant's allegation of being misled into abandoning his discrimination claims at the prehearing conference. The prehearing discussions were not on the record. The record does show, however, that after the presiding official stated forthe record the results of the conference, including appellant's stipulations as to the withdrawal of the discrimination claims, he asked if those statements were accurate and if there were any objections. Appellant's counsel did not object or place any other understanding on the record. Appellant also admits in his brief that he was informed by the EEOC, when it dismissed his collateral action, that "to have his allegations of discrimination ruled on he would have to bring them to the attention of the MSPB."

provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the [MSPB] shall be filed in the U.S. Court of Appeals for the Federal Circuit." Section 7703(b)(2) provides in part that cases of discrimination subject to the provisions of §7702 should be filed under the relevant statute based on the form of discrimination alleged. Section 7703(c) provides for a trial de novo by the reviewing court in discrimination cases. The reviewing court in a "mixed" case of both discrimination and non-discrimination issues is a district court. Wiggins v. U.S. Postal Service, 653 F.2d 219, 221-222 (5th Cir. 1981); Williams v. Dept. of Army, 715 F.2d 1485, 1488-1489 (Fed.Cir. 1983)(en banc).

The district court's decision is correct. In Blake v. Dept. of the Air Force, 794 F.2d 170, 172-173 (5th Cir. 1986), we held that the Court of Appeals for the Federal Circuit has "exclusive jurisdiction when all discrimination claims have been eliminated from the case (citations omitted)." As to appellant's

non-discrimination claim challenging the reasonableness of his reassignment, the record establishes that there was no genuine fact issue in the absence of a discrimination claim. Summary judgment was therefore appropriate.

ISSUE 2: The second issue is whether the court erred in not finding some other basis of subject matter jurisdiction for appellant's claims, particularly his EEOC appeal.

As to the discrimination claims in appellant's complaint and the constitutional citations, Title VII preempts all other remedies, including a cause of action based on a constitutional claim. Brown v. G.S.A., 425 U.S. 820, 835, 96 S.CT. 1961, 48 L.Ed.2d 402 (1976). Appellant's citation of 5 USC §§2301 and 2302 does not provide authority to initiate an action in district court. Under Broadway, 694 F.2d at 983, the only source of federal district court review for a federal employee under the Civil Service Reform Act of 1978 is 5 USC §7703(b)(2).

In his complaint, appellant requested review of all of the personnel actions taken by HUD.

As previously stated, the first three actions, the unsatisfactory performance rating and the two written reprimands, were the subject of an EEOC hearing which resulted in a decision of "no doscrimination." The decision was appealed to the EEOC Office of Review and Appeals on Dec. 13, 1985. 42 USC §2000e-16(c) (with an incorporated reference to subsection (a)) provides in part that complaints of discrimination in personnel actions filed with the EEOC may not be appealed to the district court in a civil action unless a complaint is filed in court within 30 days of receipt of notice of final action by the EEOC or after failure by the EEOC to take action within 180 days from the filing with the EEOC.

The government argues that since Chaires took an appeal to the EEOC Office of Review and Appeals on Dec. 13, 1985, the claims must be dismissed as premature, since he waited only 97 days before filing his complaint in district court, and not the 180 days that the statute mandates. We have recognized that .

there can be an equitable waiver of this requirement. Johnson v. U.S.Postal Service, 364 F.Supp. 37, 38 (N.D.Fla. 1973), aff'd, 497 F.2d 128 (5th Cir. 1974). But we need not resolve the jurisdictional issue on the basis of this rule and possible waiver of this rule. The short answer is that the two reprimands were cancelled on July 12, 1983. Since there are no allegations of loss in pay or privileges specifically as a result of the reprimands, these claims are moot.

Even if Chaires were given the opportunity to demonstrate discrimination in the performance evaluation of 1982, he would still not be able to challenge the reassignment and termination because he relinquished his discrimination contentions concerning those actions. Appellant now alleges harm in his employment resulting from the denial of his application for the Regional Director in September 1983. This allegation, however, was not included in the first three personnel actions brought before the EEOC and the

III.

In summary, the court was correct in determining that as to the fourth personnel action, appellant's reassignment and termination, his withdrawal of his discrimination claims mandated jurisdiction in the Court of Appeals for the Federal Circuit. The lack of allegations in the complaint as to damages from the other three personnel actions justified their dismissal. The judgment on the pleadings under Fed. R. Civ. P. 12(c) is correct.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 87-1267

LEONARD CHAIRES,
Plaintiff-Appellant

versus

THE U.S. DEPARTMENT OF
HOUSING AND URBAN
DEVELOPMENT, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court

for the Northern District of Texas

(February 1, 1988)

Before CLARK, Chief Judge, Williams and Davis, Circuit Judges.

BY THE COURT :

IT IS ORDERED that the motion of appellant for rehearing or modification of the Court's opinion entered on December 9, 1987 is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LEONARD CHAIRES	*	
v.	*	CA3-86-702-F
THE U.S. DEPT. OF HOUSING AND URBAN DEVELOPMENT, ET AL.	*	DATE:JULY 23,1986

ORDER

This case is before the Court on Defendant's Motion to Dismiss. Having reviewed the motion, Plaintiff's response thereto, and the applicable law, the Court is of the opinion the motion should be granted.

Plaintiff is proceeding in this case pro se, and therefore, the allegations in his complaint must be liberally construed. See Haines v. Kerner, 404 U.S. 579 (1972). Even a liberal reading of Plaintiff's complaint, however, leads to the inevitable conclusion that some of the bases upon which he seeks relief are without merit.

Despite the length of Plaintiff's complaint, he complains essentially of four personnel actions taken during his tenure as a federal

employee:

a. an unsatisfactory performance rating issued Nov. 1, 1982(see ¶35, Plaintiff's Complaint);

b. two written reprimands, delivered May 26, 1983, and May 27, 1983 (See ¶49, Plaintiff's Complaint);

c. removal from the federal service effective Sept. 9, 1983, for refusal to accept a directed reassignment (see ¶72, Plaintiff's Complaint).

These actions were appealed by Plaintiff through various administrative proceedings available to federal employee.

Plaintiff brings this action against the Department of HUD, and numerous employees of HUD in their individual capacities. He asserts claims under:

a. The First and Fifth Amendments of the U.S. Constitution;

b. The Civil Rights Act of 1871, 42 U.S.C. §§1985, 1986;

c. The Civil Service Reform Act of 1978, 5 U.S.C. §§2301, 2302

d. The Civil Rights Act of 1968, 42 U.S.C. §3601, et seq.(The Fair Housing Law);

e. §717 of the 1972 amendments to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e)-16; and

f. The Administrative Procedure Act, 5 U.S.C. §701, et seq.

Defendants seek dismissal of all claims as against the individual defendants.

Under Bush v. Lucas, 462 U.S. 367 (1983), a personnel action related claim cannot be brought against federal officials in their individual capacities. See also Broussard v. U.S.Postal Service, 674 F.2d 1103 (5th Cir. 1982); Drummond v. Merritt, __ F.Supp. __ (N.D.Tex. 1986)(Porter, J.). Further, Plaintiff's exclusive remedy for claims of discrimination in federal employment is Title VII, and a Title VII action may not be maintained against any entity other than the government agency. See Brown v. General services Administration, 425 U.S. 820 (1976).

To the extent jurisdiction over a discrimination complaint is vested in the district court, on appeal from the MSPB, See 5 U.S.C. §7703(b)(2), such a complaint may not be maintained against individual defendants such as are named in Plaintiff's complaint. As for Plaintiff's claim under the Fair Housing Act,

42 U.S.C. §3601, et seq., his complaint fails to state a claim upon which may be granted as against the individual defendants in this case. No allegations are made in the complaint which in any way state a claim of discrimination in the sale or rental of housing, and this statute has no application to the situation of which Plaintiff complains.

Finally, Plaintiff fails to state a claim upon which relief may be granted under the Administrative Procedures Act, 5 U.S.C. §701, ey seq..See Broadway v. Block, Id. Also, the the Administrative Procedure Act does not provide relief against individual defendants. See 5 U.S.C. §702.

Accordingly, Plaintiff's complaint is hereby DISMISSED as to the individual defendants, and Defendant's motion is hereby GRANTED.

SIGNED AND ENTERED this 23rd day of July, 1986.

/s/ Jerry Buchmeyer
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LEONARD CHAIRES	*	
	*	
v.	*	CA3-86-702-F
	*	
THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al.	*	DATE: DECEMBER 19,1986
	*	

ORDER

This case is before the Court on Defendants' Motion for Judgment on the Pleadings, or in the alternative, for Summary Judgment. Having reviewed the motion, the response thereto, and the applicable law, the Court is of the opinion the motion should be granted.

The facts of this case are set out exhaustively in the pleadings on file. As noted in the instant motion, however, this Court lacks jurisdiction over an appeal from a decision of the Merit Systems Protection Board which is not a "mixed" claim. See 5 U.S.C. §7703 (b) (1) & (2). When Plaintiff withdrew his affirmative defenses of discrimination at the MSPB, his claim ceased to be a "mixed" claim. Therefore,

jurisdiction over this appeal is solely within the powers of the United States Court of Appeals for the Federal Circuit, and not in this or any district court.

Accordingly, it is herby ORDERED that Defendants' Motion for Judgment on the Pleadings is hereby GRANTED.

Signed this 19th day of December, 1986.

s/Jerry Buchmeyer

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LEONARD CHAIRES	*	
	*	
V.	*	CA3-86-702-F
	*	
THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al	*	DATE: DEC. 19, 1986
	*	

JUDGMENT

The Court, having by separate order granted Defendants' Motion for Judgment on the Pleadings, hereby enters JUDGMENT against Plaintiff in favor of Defendants. Plaintiff shall take nothing from Defendants, and each party shall bear their own costs.

SO ORDERED this 19th day of December, 1986.

s/Jerry Buchmeyer

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LEONARD CHAIRES	*	
	*	
v.	*	CA3-86-702-F
	*	
THE U.S. DEPT. OF HOUSING AND URBAN DEVELOPMENT, ET AL.	*	DATE: MARCH 26, 1987

ORDER

This case is before the Court on Plaintiff's Motion for Reinstatement or Reconsideration. Having reviewed the motion, the response thereto, and the applicable law, it is hereby

ORDERED that the Motion to Reinstate and for Reconsideration is DENIED, for reasons which are stated adequately in Defendant's response to the motion.

SO ORDERED this 26th day of March, 1987.

/s/ Robert W. Porter
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

DALLAS REGIONAL OFFICE

LEONARD CHAIRES, Appellant, v. DEPT. OF HOUSING AND URBAN DEVELOPMENT, Respondent.	No. DA07528311023 Date Jan. 20, 1984

DECISION

Introduction

By petition filed Sept. 23, 1983, Leonard Chaires appealed from the action of the Dept. of Housing and Urban Development (HUD) which removed him from the position of Supervisory Equal Opportunity Specialist at the Fort Worth Regional Office, Fort Worth, Texas, on Sept. 9, 1983. This action is appealable to the Board pursuant to 5 U.S.C. §§7511-7513.

Analysis and Findings

Appellant was removed for refusal to accept reassignment to the position of Supervisory Equal Opportunity Specialist at Chicago, Ill. Appellant was notified of the reassignment by letter dated June 1, 1983, and the reassignment

was to be effective July 10, 1983. By letter dated June 27, 1983, appellant refused the reassignment. His removal therefor was proposed by letter dated July 14, 1983. He replied in writing om August 2, 1983, and orally on Aug. 23, 1983. He was advised of the decision on the proposed removal on Sept. 7, 1983.

Appellant has not challenged the agency's authority to accomplish his reassignment, challenged that he was reassigned to Chicago, or that he refused to accept reassignment. His sole claim on appeal is that the reassignment was arbitrary and a pretext to secure his removal from the agency. He further stipulated that he was not raising any claims by way of affirmative defenses of prohibited personnel practices,[1] but chose to proceed instead on the basis that the agency could not establish, by a preponderance of the

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[1] Appellant had initially raised the issue as the bona fides of the reassignment in his petition for appeal and supplementary pleadings, claiming therein that the agency's reasons for

evidence, that there were legitimate management reasons for the reassignment as required by the Board's decision in Ketterer v. Dept. of Agriculture, 2 MSPB 459 (1980).(Tr.pp.3-5). the issue to be first addressed therefore is the agency's burden of proof and the applicability of Ketterer thereto.

In Ketterer, the Board relied on its decision in Losure v. Interstate Commerce Comm., 2 MSPB 361 (1980). The Board held in Losure that when the bona fides of the agency's reason for separation are at issue, as, for example, when the employee claims they are a pretext, the agency's burden under 5 U.S.C. §7701(c)(1)(B) includes a showing that the reason is also based on "management considerations appropriately committed to agency discretion." Losure, 2 MSPB 366. The Board thus held in Ketterer that;

> The same analysis applies to a removal upon a refusal to accept a reassignment. As part of its initial burden, the agency must come forward with evidence showing a

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reassignment constituted prohibited personnel practices under 5 U.S.C. §2302(b).

> legitimate management reason for the reassignment. Together withevidence that the employee had adequate notice of the decision to transfer and that he refused to accept the reassignment, this would ordinarily be sufficient to establish a prima facie case. (Footnotes omitted).

Ketterer, 2 MSPB at 462.

In this case, appellant having stipulated as to notice, and that he refused reassignment, the inquiry is limited to whether the agency has met its initial burden of showing legitimate reasons for reassignment. In this regard, the agency presented testimony from Dick Eudaly, Fort Worth Regional Administrator, and Gordon Walker, Deputy Undersecretary for Field Coordination. The substance of the testimony is that appellant was reassigned because of complaints of conflicts with appellant which resulted in a poor working relationship and interfered with the operation of the Region. The conflict between appellant and Eudaly, according to the record, became so severe that it resulted in a confrontation with appellant in the office in full view of subordinate regional office employees.

Walker, in his testimony, verified that Eudaly had indeed complained to him about appellant's lack of cooperation, and that he, Walker, had personally seen evidence of this poor working relationship during his visit to the region in April of 1983. (Tr. pp. 77-80). Further, according to the agency, Eudaly was a recently appointed Regional Administrator without prior HUD experience. It was thus essential that key staff persons, such as appellant, be fully supportive of his efforts as Regional Administrator (RA).

According to Walker, the reassignment decision occurred in two phases. First, Walker determined that it was necessary to transfer appellant in order to eliminate the friction within the Fort Worth Regional Office. The Second phase was the selection of an appropriate assignment for appellant. In this regard Walker elaborated that the regional EEO official for the Chicago Region, as well as an official on the administrator's staff in the Seattle Region, were having similar con-

flicts with their respective RA's. Thus, Walker decided to effect a three-way transfer wherein the Chicago EEO Officer would transfer to Seattle, the Seattle official transfer to Fort Worth,and appellant transfer from Fort Worth to Chicago. Concurrence in this decision was solicited and received by Walker from the RAs involved as well as Antonio Monroig, Assistant Secretary for Fair Housing and the individual in the Secretary's office having programatic responsibility over appellant's activities as Equal Opportunity Specialist. Chicago was considered particularly desirable as a transfer for appellant, accordingto Walker, because of Appellant's extensive experience working with the Hispanic community, and the large Hispanic population of the Chicago Region. (See affidavit of Walker, Agency file, Tab 1, Tr. pp. 75-6, 94).

On consideration of the testimony of Walker and Eudaly, as well as the corroborating testimony furnished by Monroig, I find that the agency has presented credible evidence of legitimate

reasons for appellant's reassignment, See Egger v. Phillips, No. 80-2503 (7th Cir. June 2, 1983); Robb v. Railroad Retirement Board, MSPB Docket No. CHO7528110211 (May 25, 1982);Hayden v. Dept. of Interior, 5 MSPB 102 (1981), and thus has established a prima facie case on the merits.

Appellant testified claiming that Eudaly had determined to get rid of him based on personal animosity. This animosity, according to appellant, involved philosophical differences concerning the proper operation and goals of the Regional EEO function, as well as Eudaly's reaction to the many complaints, and greivances of appellant against Eudaly. Appellant thus asserts that Eudaly Motivated by revenge, engineered his reassignment as a pretext for his removal.

As previously noted, the discretionary action of an agency in transferring an employee may not be used as a pretext in securing that employee's separation. McClellan v. Andrus, 606 F.2d 1278 (D.C. Cir. 1979); Ketterer, supra. Such a pretext

may be found when the employee presents evidence that the agency directed the reassignment knowing or having reason to know that he would not accept the reassignment. See Motto v. General services Administration, 335 F. Supp. 694 (E.D. La. 1971), aff'd 502 F.2d 1165 (5th Cir. 1974)(cert. denied 420 U.S. 927(1975)); Special Counsel v. Dept. of Energy, MSPB Docket No. HQ12088210053 (Jan. 10, 1983). However, appellant has presented no evidence of such pretext in this case, and the record contains not a shred of evidence that the agency knew or believed appellant would be unable to accept the reassignment. With regard to appellant's claim of animus, there can be little doubt, in light of the voluminous documentation in the record concerning such conflicts, and appellant's admissions thereto, that animus existed both on the part of the appellant and the RA. Nevertheless, there is no evidence that personal animosity in any way caused the reassignment action. On the contrary, both Eudaly and Walker testified that Eudaly had not requested

appellant's reassignment, and that he had no input into that decision whatsoever, except to the extent that his concurrence was solicited by Walker after the decision had been made. Further, according to Walker's unrebutted testimony he had no knowledge of any of the reasons underlying the conflict between Eudaly and appellant, and he was unaware that appellant had filed any grievances or complaints. The existence of friction between an employee and a supervisor is not an uncommon occurrence in cases of this type as noted in Egger, Robb, and Hayden, supra, and a transfer to eliminate such friction or the disruption caused thereby, does not establish pretext, but rather constitutes a legitimate basis for the employee's transfer. Appellant's claim of animus in this case, therefore, does not rebut the agency's prima facie case. Accordingly, the agency has by a preponderance of evidence supported its reason for removal, and that reason is sustained.

Appellant also takes issue with the penalty

suggesting that the agency failed to consider the factors required by the Board's decision in Douglas v. Veteran's Administration, 5 MSPB 313 (1981). He cites a long list of such factors in his closing argument.

An agency has authority to transfer its employees for any of the reasons appropriately committed to its discretion. Having determined that the exercise of the agency's discretion was appropriate in this particular case, Appellant's refusal amounts to an act of insubordination, not curable by the imposition of a lesser penalty. Because appellant accepted removal rather than transfer, it is clear that a lesser penalty would not result in his acceptance of reassignment. Further, record is uncontroverted in this case that the agency was willing to impose no penalty at all were appellant to accept the reassignment. Finally, appellant by failing to report to the position to which assigned is absent therefrom without authorization. The agency was left with no choice under the circum-

stances but to separate appellant, and its decision that such action was warranted in this case cannot be deemed arbitrary, capricious, or unreasonable.

Decision

The agency action is AFFIRMED.

/s/ Walter Orr
Presiding Official

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

LEONARD CHAIRES, Appellant	)	DOCKET NUMBER
	)	DA0752831102 3
v.	)	
	)	
DEPT. OF HOUSING AND URBAN DEVELOPMENT, Agency.	)	Date: July 9, 1984
	)	

ORDER

Having considered the appellant's petition for review of the initial decision issued on January 20, 1984, and finding that it does not meet the criteria for review set forth at 5 C.F.R. §1201.115, the Board hereby DENIES the petition.*

* * * * *

FOR THE BOARD:

/s/ Paula A. Latshaw

ACTING SECRETARY
WASHINGTON, D.C.

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* See Egger v. Phillips, 710 F.2d 292, 315 (7th Cir. 1983)(strained working relationship is an appropriate basis for reassignment); Burton v. United States, 404 F.2d 365 (Ct. Cl. 1968), cert. denied, 394 U.S. 1012 (1969)(refusal to accept reassignment is valid ground for removal); Douglas v. Veterans Administration, 5 MSPB 313, 333 (1981)(the Board will modify an agency imposed penalty only when it finds that the agency's

* judgement clearly exceeded the limits of reasonableness); Russo v. Veterans Administration, 3 MSPB 427, 429 (1980)("new" evidence must be of sufficient weight to warrant an outcome different from that ordered by the presiding official).

To the extent that the arguments made in the petition for review relate to the presiding official's factual determinations, we find that the petition does not demonstrate any factual error by the presiding official, based on specific references to the record, sufficient to warrant the Board's full review of the record. See Weaver v. Department of the Navy, 2 MSPB 297, 299 (1980). Moreover, the Board gives due deference to the assessment of the presiding official who was present to hear and observe the demeanor of the witnesses. Id.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Leonard Chaires, Petitioner	)	DATE: FEB. 26,1986
	)	Petition
v.	)	No. 03840192
	)	
Department of HUD, Agency	)	MSPB No.
	)	DA07528311023

DECISION

Introduction

On Aug. 15, 1984, Leonard Chaires (hereinafter referred to as petitioner) timely initiated a petition for review by the Equal Employment Opportunity Commission (EEOC) of the final decision and order of the Merit System Protection Board MSPB), concerning his allegations of sex (male), national origin (Hispanic) and reprisal (prior EEO complaint) in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §20002 et seq., and age (over 40) in violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §621 et seq. Because the petition involves an action occurring subsequent to Jan.11, 1979, the effective date of the Civil Serv-

ice Reform Act of 1978, It is governed by the provisions of that Act and EEOC Regulations 29 C.F.R. §1613.414 et seq.

BACKGROUND

At the time of the alleged discrimination, petitioner was employed as a Supervisory Equal Opportunity Specialist, GM-15, at the Fort Worth, Texas Regional Office of the Dept. of HUD (hereinafter referred to as agency). On July 14,1983, the agency proposed removing petitioner for failure to report for a directed reassignment to the position of EO Officer, GM-15, in the Chicago, Ill. Regional Office of the agency. After the effective date of the removal, Sept. 9, 1983, petitioner appealed this action to the MSPB, raising allegations of sex, national origin, age, and reprisal discrimination.

The record shows that petitioner was notified of his reassignment in a June 1, 1983, letter from the agency's Asst. Secretary for Administration. The letter stated that the action was taken "for the good of the serv-

ice because [petitioner's] extensive knowledge and management of the EO Program [could] be best utilized in the Chicago Region." MSPB Record at 178. Petitioner responded in a June 27, 1983, letter declining the reassignment and requesting documentation of the reason for the action. Petitioner also requested a stay of the action and permission to remain in his position. MSPB Record at 180. In a July 8, 1983 reply, petitioner's request for a stay of action was denied. Petitioner was also advised that the reassignment was to be effective on July 10, 1983, and that failure to report would result in a proposal to involuntarily separate petitioner. MSPB Record at 182. As noted above, the agency proposed removing petitioner on July 14, 1983. MSPB Record at 184-185. In a July 18, 1983 letter to petitioner, he was advised that the reason for the decision to reassign him was not documented but was based on a consensus of the two RAs involved as well as the Deputy Under Secretary

for Field Coordination. MSPB at 189. In petitioner's Aug. 2, 1983, response to the decision (MSPB Record at 197), petitioner requested the opportunity to make an oral presentation in addition to the written narrative response enclosed with the letter. In the enclosed narrative (MSPB Record at 201-207), petitioner reviewed his more than 25 years of federal service. He noted awards received and training sessions in which he ha participated. Petitioner claimed he did not receive written or verbal guidance from the new RA whose temporary appointment of Feb. 22, 1982, was made permanent on April 4, 1982. Petitioner claimed that the Deputy RA has relied heavily on the agency's Headquarter Evaluation Report in giving petitioner an unsatisfactory rating Oct. 1, 1981 to Sept.30, 1982. Petitioner had filed grievances and complaints against these management officials and believed that the RA, in reprisal for these complaints, had been instrumental in having the reassignment effected in order

to remove petitioner from his current position. Petitioner also noted that he was recently informed by the Deputy Area Manager of the Dallas Area Office that the RA allegedly made it known, shortly after he was appointed, that this Deputy Area Manager would be given petitioner's job. Id.

The record shows petitioner presented his oral reply to the proposal to remove him to the Secretary's designated representative, the Deputy Under Secretary for Field Coordination (DUSFFC). MSPB Record at 229-318). In a Sept. 6, 1983, letter to petitioner, the Secretary informed petitioner of the decision to remove him, effective Sept. 9, 1983. MSPB Record at 323.

As noted above, petitioner appealed the reassignment and removal to the MSPB.A hearing was held on Dec. 7, 1983. At the hearing, the Presiding Official (PO) noted that at the prehearing conference appellant indicated that his challenge to the reasons for reassignment would not be based on the allega-

tions of discrimination but that these allegations would only be used to "bring into the issue the legitimacy of those agency reasons." Hearing Transcript (HT), 5. The PO accepted this as a stipulation from petitioner and stated that the allegations of discrimination would be addressed "in this context only...." Id. The issue and primary focus of the hearing was whether the reasons for the reassignment were "of a type legitimately committed to agency discretion." HT, 4.

In its opening statement, the agency asserted that evidence would show that in April 1983, the DUSFFC decided that petitioner should be reassigned because of his strained working relationship with the RA who was also petitioner's immediate supervisor. The agency representative noted that the transfer was part of a three-way, reassignment of three agency employees, i.e., from Chicago to Seattle, from Seattle to Fort Worth, and from Fort Worth to Chicago. The agency asserted that the decisions to reassign and remove

were not based on considerations of sex, national origin, age or reprisal for filing prior complaints. HT, 9-10.

The Assistant Secretary for Fair Housing and EO testified that he had been aware of problems between petitioner and his supervisor. HT, 14-17. The Assistant Secretary further testified that he had concurred in the decision to transfer petitioner in view of petitioner's poor relationship with his supervisor and because it was thought petitioner could do a good job in Chicago where there is a large Hispanic population. HT,19. The Assistant Secretary further stated that he would not have concurred in the transfer if he had not been very concerned about the problem between petitioner and his supervisor. HT, 30.

Petitioner's Supervisor, the RA, testified that since he started his job as RA in 1982, he had had difficulty working with petitioner. HT, 40. On one occassion, the RA claimed that his questioning of petitioner regarding a

memo petitioner had written to another office "practically ended up in a physical altercation." HT,42. The RA stated that he had discussed these problems with the DUSFFC who was also the RA's immediate supervisor. The RA stated that the concerns he related to the Deputy included difficulty in achieving the goals in petitioner's area of work in view of the strained and almost hostile relationship between himself and petitioner. HT,46. The RA further stated he learned, from the Deputy, of the Deputy's decision to reassign petitioner just shortly before petitioner received the reassignment letter. HT, 18. When cross-examined regarding the statement he allegedly made shortly after his appointment regarding the replacement of petitioner by another agency employee, the Administrator asserted he did not recall the conversation. HT, 51. He also denied speaking to any official from agency headquarters regarding petitioner's removal. HT, 52. The ra stated that the decision to transfer peti-

tioner was made by the DUSFFC who was well aware of the problems that existed. HT 66-7.

The DUSFFC also testified that the reassignment was his decision. HT 73. He stated that a few months after he began his job in Feb. 1983, he thought of a transfer for petitioner and the RA "did not have a mutually beneficial working relationship to the benefit of the Department." HT 77. The Deputy also testified that his recommendation to remove petitioner was not based on considerations of age, national origin or prior discrimination complaints filed by petitioner. HT 81-82. In addition, the Deputy testified that he did not know about petitioner's complaints before the transfer took place. HT 94. when cross-examined regarding his reasons for recommending to remove petitioner, the Deputy testified: "if the employee is not successfully executing his mision or whatever the reason is...you try and create another position whereby he might be able to successfully execute that position and he refuses to do so, you then

have a situation that doesn't work." HT 95. The Deputy added that it was paramount that petitioner, at his level of responsibility, be in a positive working relationship. HT 96. The deputy further asserted that the overall mission of the program was not being effectively executed. Id.

The Deputy Area Manager, who was allegedly considered by the RA to be a replacement for petitioner, testified regarding this allegation. He stated that his Director had told him that the RA had stated that he wanted the Manager in petitioner's job when petitioner was no longer there. HT 102.

When petitioner was asked why he believed the transfer was a violation in terms of his sex, age and national origin, petitioner did not offer any evidence to show a discriminatory basis for the agency's actions. Instead, petitioner's response cited the memorandum from the Asst. Secretary for Administrative, supra, stating that the reassignment was based on the consensus of opinion among the

DUSFFC and the two RAs. HT 121.

The PO again noted in his initial decision of Jan. 20, 1984. (MSPB Record at 573-581) that petitioner had stipulated he was not raising affirmative defenses of prohibited personnel pratices but was challenging the agency's reasons for the reassignment as not being legitimate. MSPB Record at 574. The PO, therefore, did not address the question of the legitimate in the context of a discriminatory basis although the question of discrimination had been raised during the hearing. The PO found that the agency's reasons for its actions were legitimate and not pretextual.

Petitioner submitted a Feb. 20, 1984 petition to the MSPB to review the initial decision. MSPB Record at 743-755. In the petition, petitioner noted that he "withdrew as affirmative defenses all claims of prohibited personnel (sic) practices referred to in his Petition for Appeal and to raise them only by way of challenging the sufficiency of the

Department's evidence with respect to whether the reassignment was indeed based on a legitimate management consideration." MSPB Record at 745. The Board, in its final order, denied the petition. MSPB Record at 722-725. In his petition to the Commission which was received on Aug. 15, 1984, petitioner requested that the Board's final decision be reviewed with respect to claims of prohibited discrimination.[1]

ANALYSIS AND FINDINGS

The Commission must determine whether the decision of the Board viv a vis the allegations of sex, age, national origin and reprisal discrimination constitutes an incorrect interpretation of law, rule, regulation or policy directive or whether the Board's decision is supported by the evidence in the record as a whole.

The record shows that petitioner withdrew

[1] We note that the Commission has issued a decision affirming the agency's rejection of

his allegations of discrimination as affirmative defenses, and that petitioner only raised these matters to bring into the legitimacy of the agency's reasons for its action.

Assuming arguendo that these allegations were still an issue when addressed by petitional and the agency during the hearing, the Commission finds, in terms of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), that petitioner failed to establish a prima facie case of sex, national origin, and age discrimination. In addition, we find that petitioner has not met the standards for a prima facie case of reprisal discrimination. Hochstadt v. Worchester Foundation for Experimental Biology, Inc. 425 F. Supp 318 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976).

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[1] petitioner's June 4, 1984, EEO complaint, appeal no. 01852319, which alleged the reassignment was discriminatory.

CONCLUSION

Based upon a review of the record, it is the decision of the Equal Employment Opportunity Commission to concur with the final decision of the Merit Systems Protection Board.

A statement of petitioner's rights (R-3) is attached to this decision.

FOR THE COMMISSION:

/s/ Dolores L.Rozzi

Director, Office of
Review and Appeals
Date: February 26, 1986

29 C.F.R. §1613.402 DEFINITIONS

(A) MIXED CASE COMPLAINT. A Mixed case complaint as: (1) A complaint of employment discrimination filed with a federal agency, based on race, color, religion, sex, national origin, handicap, age, and/or reprisal, related to, or stemming from an action taken taken by an agency against the complainant, which action may be appealed to the MSPB, pursuant to any law, rule or regulation; or (2) A complaint of sex based wage discrimination, filed with the Commission, related to or stemming from an action taken by an agency against a complainant, which action may be appealed to the MSPB, pursuant to any law, rule or regulation. The complaint may contain only an allegation of employment discrimination or it may contain additional allegations which the MSPB has jurisdiction to address.

* * *

(C) COMPLAINT. A complaint is a formal complaint of discrimination, filed with the appropriate person designated to receive complaints at the agency, pursuant to §1613.214 of subpart B of this part.

U.S. DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT

OFFICE OF THE ASSISTANT SECRETARY
FAIR HOUSING AND EQUAL OPPORTUNITY

23 AUGUST 1983 FW 12 02

Mr. Leonard Chaires
1012 Briarcreek Drive
Arlington, Texas 76012

Dear Mr. Chaires:

SUBJECT: Notice of Receipt of Discrimination Complaint

The purpose of this notice is to acknowledge receipt of your discrimination complaint and to provide you with written notification of your rights as well as the time requirements for exercising those rights.

1. If your complaint is accepted, it will be investigated. Based on the information developed by the investigation, an effort at an adjustment on an informal basis will be made. You will receive a copy of the investigative report and have an opportunity to discuss it with an appropriate Department official.

2. If your complaint, or any allegation contained therein, is rejected, it is considered to be a final Department decision on the complaint or that portion of the complaint which is rejected. You will receive a notice by separate letter if your complaint or any part thereof is rejected and will be advised at that time of your rights of appeal.

3. If an adhustment of the complaint is arrived at, the terms of the adjustment will be reduced to writing and you will be provided a copy.

4. If an adjustment of the complaint is not arrived at, you will be notified in writing of the proposed disposition of the complaint. You will also be notified of your right to a hearing by an Equal Opportunity Complaints Examiner who will recommend a decision to the Department, or to a decision by the Director of EEO without a hearing. If you want a hearing, or a deci-

sion by the Director of EEO without a hearing, you must NOTIFY THE DEPARTMENT IN WRITING WITHIN 15 CALENDAR DAYS OF RECEIPT OF THE PROPOSED DISPOSITION OF YOUR COMPLAINT.

5. If you fail to request a hearing or to ask for a decision by the Director of EEO without a hearing within 15 days of your receipt of the proposed disposition, the EEO Officer will forward the complaint file to the Director of EEO for decision under Section 7.39 of the Department's EEO Regs.

6. If you are dissatisfied with the final decision of the Department (after a hearing or without a hearing), you may file a notice of appeal with the EEOC within 30 calendar days of receipt of the final decision or within 30 days you may file a civil action in an appropriate U.S. District Court.

7.Any appeal to the Commission should be addressed to the Director, Office of Review and Appeals, EEOC, 2401 E. Street, N.W.,

Washington, D.C. 20506. Any statement or brief in support of the appeal must be submitted to the Commission and to the Department within 30 calendar days of filing the notice of appeal.

8. If the Department has not issued a final decision on your complaint within 180 days of the date it was filed, you may file a civil action in an appropriate U.S. District Court.

9. If you decide to appeal to the EEOC you will still have an opportunity to file a civil action in a U.S. District Court within 30 days after receipt of the EEOC's decision, or 180 days after your appeal to the EEOC if no final decision on your appeal has been rendered.

We have assumed jurisdiction of your case pursuant to the provisions of Section 7.34 (a) of the Department's EEO Regulations. Therefore, this Office will determine whether your complaint comes within the

purview of pertinent regulations and will advise you in writing of the acceptance, rejection, or cancellation of your complaint.

If you should have any questions with respect to the contents of this letter, please contact Mr. Manuel E. Crawley, Director, Public Employment Division. Mr. Crawley's telephone number is (202) 755-6415.

Sincerely,

Antonio Monroig
Director of EEO

Per: /s/ Laurence D. Pearl,
Director, Office of HUD
Program Compliance

June 1, 1983

Mr. Leonard Chaires
Supervisory Equal Opportunity Specialist
Department of Housing and Urban Development
221 W. Lancaster
Fort Worth, TX 76113

Dear Mr. Chaires:

This letter is your official notification that I have decided to reassign you from your position of Supervisory Equal Opportunity Specialist in the Fort Worth Regional Office to the position of Equal Opportunity Officer in the Chicago Regional Office, Chicago, Illinois. You will be reassigned at your current pay level and grade, GM-15. Your reassignment to the Chicago Regional Offices will be effective on July 10, 1983. I believe that this reassignment is for the good of the service because your extensive knowledge and management of the Equal Opportunity Program can now be best utilized in the Chicago Region.

If you want to discuss administrative arrangements or other aspects of your reassignment, please call Mr. Marvin Leaht, Personnel Officer for the Chicago Region. Mr. Leaht may be reached at 353-5960.

Sincerely,

/s/ Judith L. Tardy
Assistant Secretary, A

July 18, 1983

Mr. Leonard Chaires
Supervisory Equal Opportunity Specialist
Department of Housing and Urban Development
221 W. Lancaster
Fort Worth, TX 76113

Dear Mr. Chaires:

This responds to the issues you raised in your letter of June 27, 1983, regarding documentation referencing my decision to reassign you to Chicago and a copy of the authority which allows me to make the reassignment.

The basis for my decision to reassign you is not documented, but is based on a consensus of the two Regional Administrators involved, Dick Eudaly and Alfred Moran,and the Deputy under Secretary for Field Coordination, Gordon Walker. I am enclosing a copy of the Department of Housing and Urban Development's (HUD's) Handbook 250.5, Chapter 1, Paragraph 4, Delegation of Personnel Authority, which provides me with the authority to make the reassignment. I am also

enclosing a copy of the June 5, 1975, Federal Register which contains the authority delegated the the Assistant Secretary for Administration to take final action with respect to HUD positions and employees.

Sincerely,

/s/ Judith L. Tardy
Assistant Secretary, A

U.S. DEPARTMENT OF HUD

July 8, 1983

Mr. Leonard Chaires
Supervisory Equal Opportunity Specialist
Department of Housing and Urban Development
221 W. Lancaster
Fort Worth, TX. 76113

Dear Mr. Chaires:

This letter responds to your letter of June 27, 1983.

Your request for a stay of action concerning your reassignment to the Chicago Regional Office is denied. Your reassignment is to be effective July 10, 1983. Failure to report will leave me no alternative but to propose to involuntarily separate you.

The information you requested in your letter under the Freedom of Information Act will be sent to you in a separate letter early next week.

Sincerely,

/s/ Judith L. Tardy
Assistant Secretary, A

Mr. Leonard Chaires July 14, 1983
Supervisory Equal Opportunity Specialist
Department of Housing and Urban Development
221 W. Lancaster
Fort Worth, TX 76113

Dear Mr. Chaires:

To promote the efficiency of the service, I am proposing to involuntarily separate you from your position of Supervisory Equal Opportunity Specialist, GM-15, no later than 30 calendar days from the date you receive this letter.

This proposed involuntary separation is issued for the following reason:

Reason: Failure to report for a directed reassignment.

Specification: In my letter to you of June 1, 1983, I directed your reassignment to the position of Equal Opportunity Officer, GM-15, in the Chicago Regional Office, Chicago, Ill. to be effective July 10, 1983. You were told that if you elected not to accept the reassignment, you may be separated from Federal Service. In your letter to me dated June 27,

1983, you declined the reassignment, and you have not reported as directed.

Enclosed for your review is my letter of June 1, 1983, directing your reassignment, and your letter of June 27, 1983, declining the reassignment.

You may answer this notice orally and/or in writing by close of business on the 10th day following the date you receive this notice. Your reply must be to Secretary Samuel R. Pierce, Jr., who will make the decision on the proposal. Consideration will be given to extending this period if you submit a request in writing to the Secretary stating your reasons for desiring more time. During the 10-calendar-day period, you will be entitled up to 16 hours of official time for preparing your reply to this proposed notice. You may submit written evidence or affidavits in support of your answer. Full consideration will be given to any reply and any evidence you submit. You have a right to

representation in the matter. You and your representative, if a HUD employee, will receive official time to present an oral reply upon request.

As soon as possible after your answer is received, or after expiration of the 10th calendar day following the date you receive this notice if you do not answer, a written decision will be issued to you. During the notice period, you will remain in an active duty status.

This proposed notice of involuntary separation has been prepared in accordance with the Office of Personnel Management Regs. Part 752 and HUDHandbook 752.2 REV.-1. If you have any questions concerning the procedures applicable to this action, you may contact Harold W. Henry, Personnel Officer, at 755-5455.

Sincerely,

/s/ Judith C. Tardy
Assistant Secretary, A

UNITED STATES OF AMERICA

BEFORE THE MERIT SYSTEMS PROTECTION BOARD

DALLAS REGIONAL OFFICE

IN THE MATTER OF	)	
	)	
LEONARD CHAIRES,	)	
	)	
Appellant.	)	
	)	
v.	)	MSPB Docket No.
	)	DA07528311023
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,	)	
	)	
Agency.	)	
	)	

DECLARATION OF GORDON D. WALKER

I, GORDON D. WALKER, declare as follows:

1. I am employed by the U.S. Department of Housing and Urban Development (HUD) in the capacity of Deputy Under Secretary for Field Coordination. I have been so employed since February 1, 1983.

2. My principal function is to advise the Secretary, Under Secretary, and other principal staff of HUD of the adequacy and effectiveness of HUD field operating poli-

cies and procedures. I represent the Secretary and Under Secretary in coordinating Headquarters and field relationships. Among other things, I review and evaluate field operations and bring to the attention of appropriate HUD officials, including the Secretary and Under Secretary, existing or developing problems with recommendations for their resolution.

3. Prior to Feb. 3, 1983, I was employed by HUD in the capacity of Special Assistant to the Secretary from Sept. 8, 1981 to Sept. 10, 1982 and from October 4, 1982 to January 31, 1983.

4. I am familiar with the removal of Leonard Chaires effective Sept.9, 1983 based on his failure to report on July 10, 1983, for a directed reassignment from the position of Supervisory Equal Opportunity Specialist, GM-15, Office of Regional Fair Housing and Equal Opportunity, Fort Worth Regional Office, HUD, Forth Worth, Texas to

the position of Equal Opportunity Officer, Office of Regional Fair Housing and Equal Opportunity, Chicago Regional Office, HUD, Chicago, Illinois. In late April 1983, I decided that Mr. Chaires should be so reassigned because of the strained working relationship between Mr. Chaires and his superior, Dick Eudaly, Regional Administrator, Region VI, that had existed for a substantial period of time and which I attributed to a personality conflict between them. Upon my request, Judith L. Tardy, Assistant Secretary for Administration, who was the personnel management authority to reassign employees between HUD field offices, directed the reassignment described above.

5. The reassignment of Mr. Chaires referred to in the foregoing paragraph was part of a three-way move whereby Mr. Chaires was reassigned to the Chicago HUD Regional Office, Loucienne Watson was reassigned

from the position of Equal Opportunity Officer, GM-15, Office of Regional Fair Housing and Equal Opportunity, Chicago HUD Regional Office, Chicago, Ill. to the position of Regional Director, GM-15, Debt Management Unit, Seattle HUD Regional Office, Seattle, Washington, and Albert L. Berringer, formerly Director, Office of Regional Administration, Seattle HUD Regional Office, Seattle, Washington, was reassigned to the Fort Worth HUD Regional Office. The Regional Administrators for Regions V and X, as well as Mr. Eudaly, Regional Administrator for Region VI, had each expressed to me problems in their working relationships with Messrs. Watson, Barringer, and Chaires respetively.

6. I decided that Mr. Chaires should be reassigned to the Chicago HUD Regional Office as opposed to the Seattle HUD Regional Office because Mr. Chaires had extensive experience in working with the Hispanic

community. Since Chicago also has a large population, I felt that Mr. Chaires could be more effective in the position of Equal Opportunity Officer for the Chicago HUD Regional Office.

7. In late April 1983, when I decided that Mr. Chaires should be reassigned, I was aware that Mr. Chaires had filed complaints concerning his performance evaluation for fiscal year 1982. I did not, however, request that Mr. Chaires be reassigned because he had filed those complaints.

8. In arriving at my decision that Mr. Chaires should be reassigned, I did not consider Mr. Chaires' national origin.

I declare upon penalty of perjury that the foregoing statements are true and accurate to the best of my knowledge and belief.

October 24, 1983
Date

/s/ Gordon D. Walker
Deputy Under Secretary
for Field Coordination

ABSTRACT OF SECRETARIAL CORRESPONDENCE

FROM: Gordon D. Walker, Deputy Under Secretary for Field Coordination, UF

SUBJECT: Leonard Chaires

ISSUE:

The purpose of this abstract is to review and make a recommendation on the matter of Leonard Chaires, who refused to accept a directed reassignment to the position of Equal Opportunity Officer in the Chicago Regional Office.

FACTS:

On June 1, 1983, Judith L. Tardy directed Mr. Chaires to report to the Chicago Regional Office on July 10, 1983, from his position of Supervisory Equal Opportunity Specialist in the Fort Worth Regional Office. On June 27, he formally declined the reassignment.

In his written and oral replies, Mr. Chaires raised the following points:

1. His family, for various reasons, did not want to move to Chicago.

2. He does not feel that his FY-82 unsatisfactory performance rating was a fair evaluation.

3. The reassignment, in his opinion, is a reprisal action in response to several grievances and EEO complaints initiated by Mr. Chaires.

COMMENTS:

Reviewing the issues raised above, items one and two are irrelevant to this decision, and item three is untrue.

Regardless of the feelings of Mr. Chaires, the reassignment to Chicago was a bona fide action and was considered necessary for the efficient and effective management of the Department. He has chosen to refuse this reassignment.

RECOMMENDATION:

Based upon my interview of this matter, I recommend Mr. Chaires' removal from the Federal Service for failure to accept a directed reassignment. Attached is a letter informing Mr. Chaires of your decision if you concur in this recommendation.

Concur: /s/ Samuel R. Pierce 9/6/1983

29 C.F.R. §1613.213(a): PRECOMPLAINT PROCESSING.

(A) An agency shall require that an aggrieved person who believes that he or she has been discriminated against because of race, color, religion, sex, or national origin, consult with an EEO Counselor to try to resolve the matter. The agency shall require the EEO Counselor to make whatever inquiry he or she believes necessary into the matter; to seek a solution of the matter on an informal basis; to counsel the aggrieved person concerning the issues in the matter; to keep a record of the counseling activities so as to brief, periodically, the EEO Officer on those activities; and, when advised that a complaint of discrimination has been accepted from an aggrieved person, to submit a written report to the EEO Officer, with a copy to the aggrieved person, summarizing the counselor's actions and advice both to the agency and the aggrieved person concerning the issues in the

matter. The EEO Counselor shall, insofar as is practicable, conduct the final interview with the aggrieved person not later than 21 calendar days after the date on which the matter was called to the counselor's attention by the aggrieved person. If, within 21 days, the matter has not been resolved to the satisfaction of the aggrieved person, that person shall be immediately informed in writing, at the time of the final interview, of his or her right to file a complaint of discrimination. The notice shall inform the complaintant of his or her right to file a discrimination complaint at any time up to 15 calendar days after receipt of the notice of the appropriate official with whom to file a complaint and of a complaintant's duty to assure that the agency is immediately informed if the complaintant retains counsel, or any other representative. The Counselor shall not attempt in

any way to restrain the aggrieved person from filing a complaint. The Equal Opportunity Counselor shall not reveal the identity of an aggrieved person who consulted the counselor, except when authorized to do so by the aggrieved person, until the agency has accepted a complaint of discrimination from that person.